

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION**

UNITED STATES OF AMERICA

v.

DAYON BAILEY

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JKB-18-506

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EMERGENCY MOTION FOR DETENTION HEARING

The Defendant, Dayon Bailey, by and through his attorneys, James Wyda, Federal Public Defender for the District of Maryland, and Laura Ginsberg Abelson and Meghan Michael, Assistant Federal Public Defenders, respectfully moves this Honorable Court to schedule a detention hearing and release him on conditions. Mr. Bailey is paraplegic and suffers from many chronic health conditions that make him particularly susceptible to contracting COVID-19 in a jail setting. He therefore asks the Court to release him on conditions for the pendency of his case, or in the alternative until the current pandemic concludes. In support of this motion, counsel states as follows:

I. Procedural posture

Mr. Bailey is charged in four counts of a five-count indictment, with conspiracy to possess with intent to distribute controlled substances, under 21 U.S.C. § 846, possession with intent to distribute controlled substances, under 21 U.S.C. § 841, unlawful possession of a firearm, under 18 U.S.C. § 922(g), and possession of a firearm in furtherance of a drug trafficking crime, under 18 U.S.C. § 924(c).

On May 16, 2019, Mr. Bailey had his initial appearance on this case. ECF No. 7. At that time, he consented to detention. He has not at any point had a detention hearing under 18 U.S.C. § 3142 in this Court. Mr. Bailey has been detained continuously at the Chesapeake Detention Facility (“CDF”) since his initial appearance.

II. Mr. Bailey suffers from chronic health conditions that require continuous care.

Mr. Bailey is a paraplegic and suffers from a number of related chronic health conditions. During the course of our representation of Mr. Bailey, we have gathered nearly 2500 of pages of medical records,¹ which reflect that Mr. Bailey suffers from frequent urinary tract infections due to his use of a catheter and pressure ulcers that require wound care multiple times per week. In addition, he has a life-long history of asthma and uses an inhaler daily. He has been hospitalized several times with sepsis because his paraplegia sometimes prevents him from recognizing symptoms of urinary tract infections until they become systemic. He also has a history of contracting drug-resistant infections while hospitalized. Because of these conditions, Mr. Bailey receives medical care at CDF several times a week.

III. The current COVID-19 outbreak places Mr. Bailey at increased risk of serious illness.

As the Court is well aware, the nation is in the midst of responding to an unprecedented national health emergency due to COVID-19, a dangerous illness that is spreading rapidly throughout the world and, of particular salience to the instant motion, throughout Maryland and the District of Columbia. As of March 18, 2020, the new strain of coronavirus which causes

¹ All of these records are available for the Court’s and the government’s review, upon request.

COVID-19, has infected over 210,300 people, leading to at least 8,809 deaths worldwide.² On March 11, 2020, the World Health Organization officially classified COVID-19 as a pandemic.³ President Trump declared a national emergency due to COVID-19 on March 13, 2020.⁴ Well prior to the national declaration, Maryland Governor Larry Hogan declared a State of Emergency in Maryland due to COVID-19 on March 5, 2020.⁵ As of the morning of March 18, 2020, there were 85 confirmed cases of COVID-19 in the state of Maryland.⁶

Courts throughout the nation, including this one, have dramatically scaled back their operations. The Supreme Court has canceled oral argument—for the first time in 102 years—for the remainder of the month.⁷ Federal courts in Maryland, Virginia, and the District of Columbia are open for emergencies only.⁸ State courts in Maryland, the District of Columbia, and Virginia

² *Coronavirus Map: Tracking the Spread of the Outbreak*, The New York Times (March 18, 2020), at <https://nyti.ms/2U4kmud> (updating regularly).

³ *WHO Characterizes COVID-19 as a Pandemic*, World Health Organization (March 11, 2020) at <https://bit.ly/2W8dwpS>.

⁴ *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, Donald Trump, March 13, 2020, available at <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

⁵ *Declaration of State of Emergency and Existence of Catastrophic Health Emergency-COVID-19*, by Governor Hogan, March 5, 2020, available at <https://governor.maryland.gov/wp-content/uploads/2020/03/Proclamation-COVID-19.pdf>.

⁶ <https://coronavirus.maryland.gov/> (updating regularly).

⁷ U.S. Supreme Court Press Release, March 16, 2020, available at https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_03-16-20.

⁸ See various Standing Orders filed in *In re COVID-19 Pandemic Procedures*, Misc. No. 20-146, United States District Court for the District of Maryland; *In re Court Operations in Exigent Circumstances Created by the COVID-19 Pandemic*, Standing Order 20-9, United States District Court for the District of Columbia; *In re: Court Operations under the Exigent Circumstances Created by the Outbreak of Coronavirus Disease 2019 (COVID-19): Temporary Continuance of Court Proceedings and Restrictions on Visitors to Courthouses*, General Order No. 2020-03, United States District Court for the Eastern District of Virginia.

are all also operating on an emergency basis and are essentially closed to the general public.⁹ Schools are shut throughout the region.¹⁰ The governor of Maryland, acting in a similar vein to officials in California, Colorado, Connecticut, Illinois, Indiana, Iowa, Kentucky, Massachusetts, Michigan, Minnesota, New Jersey, New York, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Vermont, Washington, West Virginia, and Wisconsin, has ordered that all restaurants and bars be shut down indefinitely.¹¹ Elections have been delayed, including the Maryland presidential primary scheduled for April 28, 2020.¹² The CDC recommends that any gathering of more than 50 people be cancelled or postponed for at least eight weeks, and the President of the United States urged Americans to avoid gathering

⁹ See generally Maryland Judiciary Coronavirus (COVID-19) Updates, available at <https://mdcourts.gov/coronavirusupdate>; DC Courts' Coronavirus Advisories, available at <https://www.dccourts.gov/coronavirus>; In re: Order Declaring a Judicial Emergency in Response to COVID-19 Emergency, Supreme Court of Virginia, March 16, 2020, available at http://www.courts.state.va.us/2020_0316_sev_order_declaration_of_judicial_emergency.pdf

¹⁰ See, e.g., *State Superintendent Salmon Announces Temporary Closure of Maryland Public Schools*, March 12, 2020, available at <https://news.maryland.gov/msde/state-superintendent-salmon-announces-temporary-closure-of-maryland-public-schools/>

¹¹ See *Order of the Governor of the State of Maryland Amending and Restating The Order of March 12, 2020, Prohibiting Large Gatherings and Events and Closing Senior Centers, and Additionally Closing Bars, Restaurants, Fitness Centers, and Theaters*, Governor Hogan, March 16, 2020, available at <https://www.courts.state.md.us/sites/default/files/import/coronavirus/eo20200316restatingorderofmarch12gatherings.pdf>. See also “*The States and Cities Banning In-Person Dining at Restaurants and Bars During the Coronavirus Outbreak*”, Fox News, March 16, 2020, available at <https://www.foxnews.com/food-drink/states-closing-bars-restaurants-coronavirus-outbreak>; “*LIST: States that have closed restaurants and bars to dine-in customers*,” WGNO ABC News, March 17, 2020, available at <https://wgno.com/news/health/coronavirus/list-states-that-have-closed-restaurants-and-bars-to-dine-in-customers/>.

¹² “*Ohio Governor Announces Polls will be Closed Tuesday Over Coronavirus*”, Dan Merica, CNN, March 17, 2020, available at <https://www.cnn.com/2020/03/16/politics/ohio-primary/index.html>; “*Maryland Postpones Primary, Shifts Special Election to Mail Voting Over Coronavirus*”, Alice Miranda Ollstein and Zach Montellaro, Politico, March 17, 2020, available at <https://www.politico.com/news/2020/03/17/maryland-postpones-april-28-primary-election-over-coronavirus-133776>; “*5 States Have Postponed Their Primaries Because of the Coronavirus*,” Nathaniel Rakich, FiveThirtyEight, March 17, 2020, available at <https://wgno.com/news/health/coronavirus/list-states-that-have-closed-restaurants-and-bars-to-dine-in-customers/>.

in groups of more than ten people for the next 15 days.¹³ Jails throughout Maryland have suspended visitation.¹⁴ Legal visits and social visits are suspended in all Bureau of Prisons facilities.¹⁵

Conditions of confinement create the ideal environment for the transmission of contagious disease.¹⁶ Inmates cycle in and out of detention facilities from all over the country, and people who work in the facilities including correctional officers and care and service providers leave and return daily, without screening. Incarcerated people have poorer health than the general population and, even at the best of times, medical care is limited in these facilities.¹⁷ Many people who are incarcerated also have chronic conditions, like diabetes or HIV, which makes them vulnerable to severe forms of COVID-19. According to public health experts, incarcerated individuals “are at special risk of infection, given their living situations,” and “may also be less able to participate in proactive measures to keep themselves safe;” “infection control

¹³ See “CDC Recommends Against Gatherings of Fifty or More; States Close Bars and Restaurants”, Emma Bowman, NPR, March 15, 2020, available at <https://www.npr.org/2020/03/15/816245252/cdc-recommends-suspending-gatherings-of-50-or-more-people-for-the-next-8-weeks>; “The President’s Coronavirus Guidelines for America, 15 Days to Slow the Spread”, announced March 16, 2020 and available at https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf

¹⁴ “MD State Prison Visits Suspended Immediately”, Press Release, March 12, 2020 from Maryland Department of Public Safety and Correctional Services, available at <https://news.maryland.gov/dpscs/wp-content/uploads/sites/4/2020/03/VISITS-CANCELLED-31220.pdf>

¹⁵ “Federal Bureau of Prisons COVID-19 Action Plan”, March 13, 2020, available at https://www.bop.gov/resources/news/20200313_covid-19.jsp.

¹⁶ Joseph A. Bick (2007). Infection Control in Jails and Prisons. *Clinical Infectious Diseases* 45(8):1047-1055, at <https://doi.org/10.1086/521910>.

¹⁷ Laura M. Maruschak et al. (2015). Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-12. NCJ 248491. Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics, at <https://www.bjs.gov/content/pub/pdf/mpsfj1112.pdf>

is challenging in these settings.”¹⁸ Outbreaks of the flu regularly occur in jails, and during the H1N1 epidemic in 2009, many jails and prisons dealt with high numbers of cases.¹⁹ In China, officials have confirmed the coronavirus spreading at a rapid pace in Chinese prisons, counting 500 cases.²⁰ Secretary of State Mike Pompeo has called for Iran to release Americans detained there because of the “deeply troubling” “[r]eports that COVID-19 has spread to Iranian prisons,” noting that “[t]heir detention amid increasingly deteriorating conditions defies basic human decency.”²¹ Courts across Iran have granted 85,000 inmates furlough as part of the measures to contain coronavirus across the country.²² In the U.S., steps are already being taken in some jurisdictions to facilitate the release of elderly and sick prisoners and to reduce jail populations by providing early release for some inmates and by discouraging the admission of individuals arrested on non-violent misdemeanor charges.²³ Baltimore State’s Attorney Marilyn Mosby

¹⁸ “Achieving A Fair And Effective COVID-19 Response: An Open Letter to Vice-President Mike Pence, and Other Federal, State, and Local Leaders from Public Health and Legal Experts in the United States,” (March 2, 2020), at <https://bit.ly/2W9V6oS>; “An Epicenter of the Pandemic will be Jails and Prisons, if Inaction Continues”, Amanda Klonsky, *New York Times*, March 16, 2020; “How Prisons and Jails Can Respond to the Coronavirus”, Jennifer Gonnerman, the *New Yorker*, March 14, 2020.

¹⁹ *Prisons and Jails are Vulnerable to COVID-19 Outbreaks*, The Verge (Mar. 7, 2020) at <https://bit.ly/2TNcNZY>.

²⁰ Rhea Mahbubani, *Chinese Jails Have Become Hotbeds of Coronavirus As More Than 500 Cases Have Erupted, Prompting the Ouster of Several Officials*, Business Insider (Feb. 21, 2020) at <https://bit.ly/2vSzSRT>.

²¹ Jennifer Hansler and Kylie Atwood, *Pompeo calls for humanitarian release of wrongfully detained Americans in Iran amid coronavirus outbreak*, CNN (Mar. 10, 2020) at <https://cnn.it/2W4OpV7>.

²² [Adam Payne, Iran has released 85,000 prisoners in an emergency bid to stop the spread of coronavirus](https://www.businessinsider.com/coronavirus-covid-19-iran-releases-eighty-five-thousand-prisoners-2020-3), Business Insider (Mar. 17, 2020) at <https://www.businessinsider.com/coronavirus-covid-19-iran-releases-eighty-five-thousand-prisoners-2020-3>.

²³ In New York Brooklyn District Attorney Eric Gonzalez, joined by public health experts, has asked Governor Cuomo to grant emergency clemencies to elderly and sick prisoners (Sarah Lustbader, *Coronavirus: Sentenced to COVID-19*, The Daily Appeal (Mar. 12, 2020) at <https://theappeal.org/sentenced-to-covid-19/>); Cuyahoga County (Ohio) is holding mass pleas and bail hearings to reduce the current jail population (<https://www.cleveland.com/court-justice/2020/03/cuyahoga-county-officials-will-hold-mass-plea-hearings-to->

ordered her staff to dismiss pending criminal charges against anyone arrested for, among other things, possessing or distributing drugs, and urged Governor Hogan to free inmates who are over the age of 60, approved for parole, or scheduled to complete their sentences within the next year.²⁴

The federal bench in the District of Maryland is well aware of many of the challenging conditions of confinement that individuals confront in the local federally-contracted facilities that are relied upon by the court for defendants awaiting trial. These harsh conditions have also not infrequently been the basis for Maryland district court judges to provide downward variances when sentencing individuals in this jurisdiction. *See, e.g., United States v. Amin Laguna Morales*, No. TDC-19-cr-180 (finding it appropriate to grant a downward variance due in part to the poor conditions of pretrial confinement at CDF and the D.C. Jail).

It is unrealistic to expect that, in a time of national emergency and in the face of a pandemic, these same facilities would have the resources necessary to engage in screening and testing of inmates, correctional staff, law enforcement officers and other care and service providers who enter the facility. Moreover, each new arrestee brought from the community into

[reduce-jail-population-over-coronavirus-concerns.html](https://www.wkbn.com/news/coronavirus/mahoning-county-jail-refusing-some-inmates-due-to-coronavirus-outbreak/)); Mahoning County (Ohio) jail is refusing all non-violent misdemeanor arrestees (<https://www.wkbn.com/news/coronavirus/mahoning-county-jail-refusing-some-inmates-due-to-coronavirus-outbreak/>); see also Collin County (TX) (<https://www.dallasnews.com/news/public-health/2020/03/12/facing-coronavirus-concerns-collin-county-sheriff-asks-police-not-to-bring-petty-criminals-to-jail/>). *See also* “Ohio Jail Releases Hundreds of Inmates Due to Coronavirus Concerns”, <https://kfor.com/health/coronavirus/ohio-jail-releases-hundreds-of-inmates-due-to-coronavirus-concerns/>; “Los Angeles is Releasing Inmates Early and Arresting Fewer People Over Fear of the Coronavirus in Jails” <https://www.buzzfeednews.com/article/salvadorhernandez/los-angeles-coronavirus-inmates-early-release>; “Sheriff suspends non-violent arrests due to COVID-19” Alyssa Mauk, March 14, 2020, *The Journal Times*.

²⁴ Tim Prudente and Phillip Jackson, *Baltimore State’s Attorney Mosby to stop prosecuting drug possession, prostitution, and other crimes amid coronavirus*, Baltimore Sun (Mar. 18, 2020) at <https://www.baltimoresun.com/coronavirus/bs-md-ci-cr-mosby-prisoner-release-20200318-u7kneb6o5gqvnmtpjftavia-story.html>.

local federal custody facilities will be held with the existing population, potentially bringing COVID-19 into the jail population. The large number of inmates, close quarters, and low sanitary conditions create an especially alarming breeding ground for new COVID-19 cases.

The courts have long recognized that there is no greater necessity than keeping a defendant alive, no matter the charge. As Judge Weinstein held, “We do not punish those who have not been proven guilty. When we do punish, we do not act cruelly. Continued incarceration of this terminally ill defendant threatens both of these fundamental characteristics of our democracy.” *United States v. Scarpa*, 815 F. Supp. 88 (E.D.N.Y. 1993) (pretrial defendant with AIDS facing murder charges released on bail because of the “unacceptably high risk of infection and death on a daily basis inside the MCC”).

This Court should consider the “total harm and benefits to prisoner and society” that continued imprisonment will yield, relative to the heightened health risks posed during this rapidly encroaching pandemic. *See Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring) (calling for heightened judicial scrutiny of the projected impact of jail and prison conditions on a defendant); *United States v. Mateo*, 299 F. Supp. 2d 201, 212 (S.D.N.Y. 2004) (reducing sentence where defendant’s pretrial conditions were “qualitatively more severe in kind and degree than the prospect of such experiences reasonably foreseeable in the ordinary case”). The risk to the jail population, the staff of the correctional facilities, and the community at large is lessened when fewer inmates are detained.

IV. Mr. Bailey is particularly at risk of contracting COVID-19 and of serious illness from the virus.

Though risks of COVID-19 apply to all detainees, Mr. Bailey is at particular risk because of his chronic health conditions. First, as a practical matter, he has significantly more contact with the medical unit at CDF and with medical providers than most other detainees. His medical care, which includes tending to his catheter and pressure wounds, necessitates close physical contact with CDF medical staff. Moreover, he receives medical care multiple times per week even when healthy. Thus, should detainees at CDF contract the virus and seek medical treatment, Mr. Bailey is more likely to come in contact with them, as well as CDF medical staff, who may be asymptomatic carriers of the illness.

Second, Mr. Bailey's health conditions make him more susceptible to the illness. He has a history of contracting secondary illnesses, including infection from methicillin-resistant staphylococcus aureus (MRSA), severe sepsis, osteomyelitis (bone infections), bladder infections, and other infections caused by hospital-prevalent germs because of his lack of sensation in the lower half of his body and his frequent medical treatment. In the four years preceding his arrest, he contracted acute urinary tract or bladder infections at least *twenty* times, sometimes requiring overnight hospitalization. He also is at greater risk of serious illness because he has asthma and chronic obstructive pulmonary disease (a progressive lung disease), which has compromised his lung function to the point where he is required to use an inhaler daily. The CDC has warned that individuals with asthma "may be at a higher risk of getting sick

from COVID-19,” because it “can affect [one’s] respiratory tract (nose, throat, lungs), cause an asthma attack, and possibly lead to pneumonia and acute respiratory disease.”²⁵

WHEREFORE, Mr. Bailey requests that the Court set a detention hearing and grant his request to release him on conditions of release. Counsel has conferred with Assistant United States Attorney Zachary Stendig, who opposes this relief and plans to file a written response to this motion.

Respectfully submitted,

JAMES WYDA

Federal Public Defender for the District of Maryland

/s/

Laura Ginsberg Abelson (#29363)
Meghan Michael (#811137)
Assistant Federal Public Defenders
Office of the Federal Public Defender
100 S. Charles St.
Tower 2, 9th Floor
Baltimore, MD 21201
Telephone: (410) 962-3962
laura_abelson@fd.org
meghan_michael@fd.org

²⁵ *People with Asthma and COVID-19*, Centers for Disease Control and Prevention, at <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/asthma.html>